

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

KIMBERLY M.,
Plaintiff,

v.

KILOLO KIJAKAZI, ACTING
COMMISSIONER OF SOCIAL
SECURITY,
Defendant.

Case No. [19-cv-06585-DMR](#)

**ORDER RE MOTION FOR
ATTORNEYS' FEES**

Re: Dkt. No. 27

Plaintiff Kimberly M.'s counsel, Joshua B. Kons, filed a motion for attorneys' fees pursuant to 42 U.S.C. § 406(b). [Docket No. 27.] Defendant Kilolo Kijakazi, Acting Commissioner of Social Security, filed a response. [Docket No. 29.]

Kons represents that Plaintiff was awarded \$139,119.90 in retroactive Title II benefits. He asks the court for a net award of \$18,827.29 in attorneys' fees payable out of Plaintiff's past due benefits. This sum represents a total attorneys' fee award of \$25,579.98 minus \$6,752.69 in fees payable by the government pursuant to the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(b), which the court previously awarded.¹ [See Docket No. 26.]

In this motion, Kons' interests are adverse to those of his client, because any fees that the court awards Kons pursuant to 42 U.S.C. § 406(b) will come from Plaintiff's past-due benefits. In other words, if the court grants Kons' motion and awards fees, it will reduce the amount of past-due benefits that Plaintiff will receive from Defendant by \$18,827.29.

¹ A claimant's attorney who is successful in obtaining both EAJA fees from the United States and an award under 42 U.S.C. § 406(b) (which comes out of past-due benefits) must "refun[d] to the claimant the amount of the smaller fee." *Gisbrecht v. Barnhart*, 535 U.S. 789, 796 (2002) (quotation omitted). Here, Kons asks the court to order the payment of attorneys' fees in the amount of \$25,579.98 with a credit to Plaintiff for the \$6,752.69 in EAJA fees previously paid to counsel.

1 **By August 11, 2023**, counsel shall serve Plaintiff with a copy of his motion and this order
2 and shall file a proof of service. **The court grants Plaintiff until September 1, 2023 to submit**
3 **any objections to Kons' motion for attorneys' fees.** If the court does not receive any objections
4 from Plaintiff by September 1, 2023, the court will decide Kons' motion based on the papers
5 already submitted.

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7 **IT IS SO ORDERED.**

8 Dated: August 7, 2023

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11 Donna M. Ryu
12 Chief Magistrate Judge
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